84-305

Office-Supreme Court, U.S.
F I L E D
JUL 25 1984
ALEXANDER L. STEVAS,
CLERK

IN THE SUPREME COURT

OF THE UNITED STATES

October Term, 1983

No. _____

JOSEPH P. KELLY,

Petitioner,

vs.

STATE OF IDAHO,

Respondent.

PETITION FOR A WRIT OF CERTIORARI

TO THE IDAHO SUPREME COURT

Joseph P. Kelly
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McCall, ID 83638
Petitioner
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QUESTIONS PRESENTED

Whether there was probable cause to issue a search warrant.

Whether the search warrant, on its face, is a general warrant.

Whether the search warrant was generally executed.

Whether the totality of procedural and substantive errors requires suppression of all the evidence seized under the warrant.

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U.S. v. Abrams, 615 F2d 541, 26 CrL 2509 (1st Cir. 1980);

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U.S. v. Leon, No. 82-1771

U.S. v. Roche, 614 F2d 6 (1st Cir. 1980)

VonderAhe v. Howland, 508 F2d 364 (9th Cir. 1975).

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Statutes

Idaho Code §18-5401, 18-5408

Idaho and U.S. Rules of Criminal Procedure 41(d)

Petitioner Kelly prays that a writ of certiorari issue to review the judgement of the Idaho Supreme Court entered June 11, 1984, affirming his conviction under Idaho Code §37-2732(a)(1)(B), and that on hearing the judgement of conviction be reversed.

OPINIONS BELOW

The opinion of the Idaho Supreme Court (App. 3) is not yet reported; nor is that of the Idaho Court of Appeals (App. 2).

JURISDICTION

The judgement of the Idaho Supreme Court was entered June 11, 1984. This Court has jurisdiction under 28 U.S.C. §1257 (3).

QUESTIONS PRESENTED

Whether there was probable cause to issue a search warrant.

Whether the search warrant, on its face, is a general warrant.

Whether the search warrant was generally executed.

Whether the totality of procedural and substantive errors requires suppression of all the evidence seized under the warrant.

CONSTITUTIONAL PROVISIONS INVOLVED

Amendment 4: Unreasonable searches and seizures. The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

STATEMENT OF THE CASE

A person gave Adams County Deputy Sheriff LeRoy Bean a tip that possible marijuana was growing off of Highway 95 at the Seesaw Ranch in Adams County. A few days later, September 14, 1978, Bean went to investigate without a search warrant.

From the highway right-of-way Bean could see a green substance growing but did not know what it was. (Trial Transcript hereinafter is Tr. All Trial Transcripts are in Appendix 5.) (Tr. Vol I, pg. 50, L. 4-13) There was other foliage and brush as well as a few trees in the same area. (Tr. Vol I, pg. 50, L. 4-13) He went off of the right-of-way and concluded the substance he saw was marijuana. (Tr. Vol I, pg. 78, L. 9-14) The substance was located

about three hundred (300) yards from the Defendant's residence. (Affidavit Hearing hereinafter is A.H.) (A.H. pg. 13, L. 25) (App. 6)

He and the sheriff then climbed a fence and pulled up about four hundred and fifty (450) plants that were about a foot high. (Tr. Vol I, pg. 63, L. 6-25) These plants were never tested or placed in evidence at any stage of the proceedings.

Bean thereafter, in a sworn proceeding to get a search warrant, told the magistrate that:

1. He visited the premises owned by J. Kelly, "the defendant"; (A.H. pg. 2, L. 23; pg. 3, L. 1-3; pg. 6, L. 2-5)

2. He observed on premises owned by Joe Kelly, alleged marijuana, from public access on the highway; (A.H. pg. 3, L. 1-6)

3. That defendant was buying land where the marijuana was seized; (A.H. pg. 6, L. 2-6)

4. That defendant lived at the Seesaw Ranch; (A.H. pg. 6, L. 7-8)

5. To Bean's knowledge no one else lived there; (A.H. pg. 6, L. 9-10)

6. Bean worked extensively with marijuana cases in California; (A.H. pg. 9, L. 6-10)

7. A path led from the area where the first alleged marijuana was seized to the residence where the defendant lived; (A.H. pg. 6, L. 17-23)

8. He concluded there would be marijuana in the defendant's home; (A.H. pg. 9, L. 21-25)

At the preliminary hearing Bean admitted that he did not know the boundaries of the defendant's farm. (Pre-

liminary Hearing hereinafter is P.H.) (P.H. pg. 80-81, L. 16-1) (App. 7)

At the suppression hearing Bean further admitted he made no effort to find out about boundaries, (Tr. Vol I, pg. 67-68, L. 20-2) and specifically denied asking the former owner about boundaries, before getting the search warrant. (Tr. Vol I, pg. 94, L. 9-16)

At the suppression hearing Bean further testified he had heard of Kelly but did not know him personally nor the defendant's marital status, family, or who lived with Kelly, if anyone. Bean denied at one point having heard anyone tell him where the defendant lived. (Tr. Vol I, pg. 68, L. 3-20)

At the preliminary hearing Bean testified he had seen marijuana many times while working in California. He indicated his experience in California

had been in animal control and lake patrol. (P.H. pg. 46-47, L. 15-19) He testified he had a two (2) day school in California on all drugs. (P.H. pg. 49, L. 9-11) He never testified in any drug related cases in California and the instant case was the first time he had ever testified in a drug case. (P.H. pg. 72, L. 18-22)

At the suppression hearing Bean testified he could not see where the path referred to above ended. (Tr. Vol I, pg. 83, L. 19) He testified it was intersected by a road. (Tr. Vol I, pg. 83, L. 8-15)

No one ever saw Kelly on the alleged path. No physical or scientific evidence was introduced at any proceeding to show that the material initially seized was marijuana. There was no positive factual evidence to show marijuana would be in defendant's home.

As a result of Bean's testimony at the magistrate hearing, wherein the prosecuting attorney conducted the questioning, the magistrate issued what the prosecuting attorney called a "broad search warrant" which specifically allowed police to search for and seize, at night, marijuana and instruments for processing and using marijuana.

The search warrant went on to say the police could search for and seize "any other fruits, instrumentalities or evidence of crime."

Additionally, the magistrate, at the prosecutor's request, said the search warrant "(included" books and records that the party might have. In other words a complete search of the premises ....." (A.H. pg. 16-17)

With the search warrant there were three (3) separate searches and seizures

beginning about 10:30 o'clock at night on September 14, 1978, spread out over two (2) days, lasting more than six (6) hours. The search area consisted of a small house (1000 to 1200 square feet) (Tr. Vol I, pg. 130, L. 7-10), some outbuildings and a yard.

Before beginning the search, but after arresting and jailing Kelly, the sheriff who executed the search warrant did not knock and announce. He did not know if anyone else was in the house. (Tr. Vol II, pg. 389, L. 10-13)

Seven (7) people took part in the first two searches; two (2) in the last. Not all the police were shown the search warrant. (Tr. Vol I, pg. 98, L. 11-20) Some were deputized on the spot. (Tr. Vol I, pg.16, L.4-12; pg.153, L.16-21)

The defendant's attorney went to the area where the search was being conducted

but was not allowed to view the search. (Tr. Vol I, pg. 118, L. 1-15)

Besides seizing alleged marijuana, the police also took bank books, a phone book, many personal writings, over one hundred (100) movie films, a film projector, a movie camera, a movie screen, a compact cassette tape recorder, some cassette tapes, and many kitchen herbs that were not marijuana. (App. 4)

The police left no inventory for the defendant, never served the defendant with the search warrant, and did not list all the items seized on the inventory filed with the court. (Tr. Vol I, pg. 138, L. 2-23; pg. 141, L. 9-22)

The trial court suppressed many of the seized items but allowed the state, over objection, to introduce evidence of alleged marijuana.

The federal questions were raised as follows:

The issues were raised in an Idaho District Court suppression hearing May 1, 1979. The adverse ruling was issued May 16, 1979. (App. 1)

A new motion to suppress based on LO-JI Sales v. New York, 60 L. Ed 2d 920, was made in the same court and denied on October 16, 1979.

The same issues were appealed once again before the Idaho Court of Appeals on June 24, 1980 and denied January 31, 1984. (App. 2)

A petition for review before the Idaho Supreme Court filed on February 21, 1984, raising the same issues was denied June 11, 1984. (App. 3)

REASONS FOR GRANTING THE WRIT

I. FRANKS v. DELAWARE

This Court in Franks v. Delaware, 438 U.S. 154, 155-56 (1978) held:

> [W]here the defendant makes a substantial preliminary showing that a false statement knowingly and intentionally, or with reckless disregard for the truth, was included by the affiant in the affidavit, and if the allegedly false statement is necessary to the finding of probable cause, the Fourth Amendment requires that a hearing be held at the defendant's request. In the event that at the hearing the allegation of perjury or reckless disregard is established by a preponderance of the evidence, and, with the affidavit's false material set to one side, the affidavit's remaining content is insufficient to establish probable cause, the search warrant must be voided and the fruits of the search excluded to the same extent as if probable cause was lacking on the face of the affidavit.

If Deputy Bean had told the truth he would have said "I didn't bring any of the substance to show you and I did not have it tested. I have never appeared in

court before on a drug case and the bulk of my law enforcement career was spent as a dog catcher and in lake patrol. I don't know Kelly, whether he owns or is buying or has any interest in the land where I found this substance. I don't know his family status or whether anyone lives with him. I saw a path but I could not see where it went." If the deputy had told the simple, honest truth, there would be no search warrant, no probable cause, and nothing would have happened.

There was no valid evidence, i.e. probable cause, on which to issue a search warrant.

In the alternative Kelly was entitled to a "Franks" hearing to pursue falsity in Bean's sworn statement to the magistrate. Idaho's definition of perjury is App. 8.

However, an admittedly broad search warrant was issued which allowed the police to search for and seize, at night, marijuana and instruments for processing and using marijuana.

The warrant went on to say the police could search for and seize any other fruits, instrumentalities or evidence of crime. (App. 9)

The magistrate added verbally that the police could search for and seize "books and records that the party might have. In other words, a complete search of the premises." (A.H. pg. 17, L. 4-10)

II. ANDRESEN v. MARYLAND

How do these facts meet this Court's test for a general warrant set out in Andresen v. Maryland, 49 L. Ed 2d 627? There it was held:

(a) that a search warrant must be specific; (b) that any general words in the search warrant must relate to specific and particular items to be seized; (c) the items seized must be reasonably related to the warrant.

The seizure was viewed retrospectively and this Court concluded in a footnote:

> [18b] We recognize that there are grave dangers inherent in executing a warrant authorizing a search and seizure of a person's papers that are not necessarily present in executing a warrant to search for physical objects whose relevance is more easily ascertainable. In searches for papers, it is certain that some innocuous documents will be examined, at least cursorily, in order to determine whether they are, in fact, among those papers authorized to be seized. Similar dangers, of course, are present in executing a warrant for the "seizure" of telephone conversations. In both kinds of searches, responsible officials, including judicial officials, must take care to assure that they are conducted in a manner that minimizes unwarranted intrusions upon privacy. Andresen v. Maryland, 49 L. Ed 2d 627, 642.

Here the warrant on its face did not authorize the seizure of personal papers,

films, a camera, projector or cassette player.

These seizures so grossly violated Kelly's constitutional rights that the U.S. 9th Circuit Court of Appeals said Kelly had stated a cause of action for damages for violation of those rights. See Kelly v. Adams County et al, No. 82-3274. This decision, P.2, noted the record presented them was devoid of any evidence that the items suppressed were related to marijuana or any other crime. (App. 10)

In George Orwell's "1984" Winston Smith, the hero, kept a diary of his feelings and photos of events. "1984" is a classic novel about the police state. The 'thought police' seized the writings and pictures when they searched his place and they didn't knock and an-

nounce. They charged him with a 'thought crime.'

An example in this petition was item #22 seized by the prosecutor and sheriff. "This morning between 8 and 9 I tried to sleep to keep you out of my mind - my conscious thoughts anyway. I rose up distractedly, trying to escape your hold on my spirit by feeding animals, cleaning up, and couldn't. Then Sally called and tried to guide while Chuck came to thank and tell of new life. And I called you and heard your voice and wouldn't let you speak - wait, I'll be there soon, flying down the hill with weeks and junk for you, seeing your face, embracing, aah, the anxious nervous feeling tides out. Let's go, find a place, be together on this day and climbing fences, taking pictures, driving up back roads, gently touching. Hey, Joan, look - treasures

shared, pleasure bare, an old iron bed and cowboy wallpaper. Then to the Tex's homestead and creek picking fruit, changing skys. We shared ourselves, what a perfect day." (App. 11)

Orwell's "1984" came to Idaho in 1978. In 1984 is the United States Supreme Court going to authorize "1984" searches and seizures?

It strikes me that an ordinary cop, executing this warrant ... finding no guns, no scales, no lamps for processing, no cash ... not one cent ..., no other alleged illegal drugs, no empty baggies to be filled, not a tool for growing marijuana ... would not consider taking bank books, cassettes, (Tr. Vol. I, pg. 141, L. 13-25), a cassette recorder, movie projector, movie screen, movie camera, five years of personal, private films and over a year's personal writing

that is similar to what is set forth above.

In Andresen none of the items seized had First Amendment status. Here the writings and films, besides having nothing to do with the warrant, are sacrosanct.

In Roaden v. Kentucky this court said:

> "In short, ... the constitutional requirement that warrants must particularly describe the 'things to be seized' is to be accorded the most scrupulous exactitude when the 'things' are books, and the basis for their seizure is the ideas which they contain. See Marcus v. Search Warrant, 367 U.S. 717, 6 L. Ed 2d 1127, 81 S.Ct. 1708; A Quantity of Books v. Kansas, 378 U.S. 205, 12 L. Ed 2d 809, 84 S.Ct. 1723. No less a standard could be faithful to First Amendment freedoms. The constitutional impossibility of leaving the protection of those freedoms to the whim of the officers charged with executing the warrant is dramatically underscored by what the officers saw fit to seize under the warrant in this case." 379 U.S., at 485, 13 L. Ed 2d 431 (footnotes omitted). 413 U.S. 496, 504.

If the United States Supreme Court allows this type of seizure without ultimate suppression of all the evidence seized, the Fourth Amendment is dead in the United States.

Federal Appeals Courts throughout the land, in far lesser situations, have suppressed all the evidence when the warrant is general on its face or has been generally executed. See U.S. v. Cook, 657 F.2d 730, 30 CrL 2126 (5th Cir. 1981); U.S. v. Abrams, 615 F2d 541, 26 CrL 2509 (1st Cir. 1980); U.S. v. Roche, 614 F2d 6 (1st Cir. 1980); In re Lafayette Academy, 610 F2d 1 (1st Cir. 1979); U.S. v. Drebin, 557 F2d 1316 (9th Cir. 1977); VonderAhe v. Howland, 508 F2d 364 (9th Cir. 1975).

A search warrant called "broad" by a prosecutor; allowing a night time search for and seizure of evidence of ANY crime;

with oral instructions from the magistrate to look for and take "books and records (without limit) ... a complete search"; is a general warrant not excusably defective under U.S. v. Leon No. 82-1771.

III. LO-JI SALES INC. v. NEW YORK

The criteria used by this Court to test if a warrant was generally executed was set forth in Marron v. U.S. There, this Court said:

> The requirement that warrants shall particularly describe the things to be seized makes general searches under them impossible and prevents the seizure of one thing under a warrant describing another. As to what is to be taken, nothing is left to the discretion of the officer executing the warrant. 275 U.S. 192, 196.

Recently this Court ruled unanimously on a case not nearly as bad as the instant matter. LO-JI Sales Inc. v. New York, 60 L. Ed 2d 920.

There a police investigator for the New York State Police appeared before a magistrate and sought a search warrant.

The police officer said he went to an adult book store and viewed some films and felt that they were in violation of the New York State obscenity laws.

The magistrate also viewed the films. On the basis of his viewing of the films he issued a search warrant.

In the present case Deputy Bean, after viewing what he thought was marijuana, but without bringing the suspected marijuana to the magistrate, sought a search warrant.

The search warrant was issued in this case as it was in the New York case.

In the New York case the search warrant was for copies of the two films that the police officer showed the magistrate, and was left open for the

addition of any other possibly obscene matters that would be found in the book store.

The search warrant here said "You are therefore commanded at any time of the day or night to make immediate search of the premises above described for the property above described." The search warrant also says "an illegal substance, to-wit: marijuana together with instrumentalities for the processing and/or use of such substance." The search warrant concludes "and for any other fruits, instrumentalities, or evidence of crime."

The magistrate then gave the prosecutor broader oral instructions to search for and seize "books and records that the party might have. In other words a complete search of the premises."

In both cases a search warrant was issued giving broad discretion to the

police solely on the basis of conclusory statements made by police officers.

In the New York case the magistrate went along with the police in an effort to show that his actions were setting up an independent judgment as far as the items left to the discretion of the police to further take. Here he gave the prosecutor verbal carte blanc.

The case before this Court is substantially weaker in that the magistrate did not go along, and in fact, the prosecuting attorney, Ken Adler, went along with the police (see Sheriff return, App. 1) With the unlimited discretion he had, the search began.

As in the New York case, the present case, if you refer to the inventory (App. 1) shown a vast number of items were seized.

However, unlike the New York case, the items seized here were not admittedly criminal.

If you notice in the New York case the defendant had plead guilty to having obscene materials.

Here there has been absolutely no criminal admission.

The inventory (App. 1 and 4) shows that personal films and personal writings were seized. They were not mentioned in the search warrant. These are the same types of things that are protected by the First Amendment to the United States Constitution, and which this Court has said in the LO-JI decision need extra special care before they can be properly seized.

Other things mentioned by this Court in the LO-JI decision were the length of the search, six hours. Essentially the

same amount of time that elapsed in the present case.

They also stressed the intensity of the search, eleven law enforcement people. If the Court will notice from the Sheriff's inventory, there were almost that number of law enforcement people at the search of Kelly's premises. (App. 1)

To paraphrase this Court's decision in LO-JI:

> "(1) This search warrant and what followed the entry on the petitioner's premises are reminiscent of the general warrant, or writ of assistance, of the Eighteenth Century against which the Fourth Amendment was intented to protect; (2) Except for the specification of copies of two films previously purchased [marijuana] the warrant did not purport to particularly describe the things to be seized; (3) Based on [perjured] conclusory statements of the police investigator that other similarly obscene materials [marijuana] would be found at the store, the warrant left it entirely to the discretion of the officials conducting the search to decide what items were likely obscene [to be related to marijuana] and to accomplish

> their seizure; (4) Nor does the Fourth Amendment countenance open-ended warrants to be completed while a search is being conducted, or after the seizure has been carried out." 60 L. Ed 2d 920, 927.

There is no evidence of any exceptions that would justify the extent of the seizures here.

This general search warrant is invalid.

There were numerous First Amendment protected items seized, justifying a finding of improper and unconstitutional general searches and seizures.

To paraphrase this Court again I say our society is better able to tolerate the alleged marijuana of Kelly than a return to the general warrant era. Violation of law must be dealt with within the framework of the constitutional guarantees.

Along with the above substantive grounds for reversal was a total disregard of Kelly's procedural rights.

First, the sheriff, while executing the nighttime warrant, admits that he did not knock and announce, contrary to the requirement by Idaho in State v. Rausch, 99 Idaho 586.

Next, the prosecutor barred Kelly's attorney from viewing the searches though the Idaho and federal law allows Kelly's representative to be present. (Rule 41[d] of the United States and Idaho Rules of Criminal Procedure, App. 12)

Additionally, the sheriff never showed Kelly the search warrant or left an inventory of what was seized, contrary to Idaho's procedural rules. See Idaho v. Kelly, App. 2, pg. 13)

All of these Fourth Amendment violations easily pass the constitutional limits of due process as well.

What crime are they fighting? Growing a substance that fifty-five million Americans have used, according to the National Academy of Science. This case shows the greatest danger from using or growing pot is having your right of privacy, under the Constitution of both Idaho and the United States, totally and completely demolished.

Should Idaho's rule be the national standard?

It does not require a constitutional scholar to conclude the disregard of numerous procedural safeguards along with the substantially false affidavit, general warrant and general execution of that warrant, are an invasion of constitutional rights of some magnitude.

Simple common sense indicates the conduct of the county officials was outrageous under settled indisputable principles of law.

The conduct here comes within no objective good faith exception. It exceeds the bounds of reason by two and a half country miles.

Therefore, all the evidence seized under the warrant should be suppressed.

Respectfully Submitted:

Joseph P. Kelly
Box 678
McCall, Idaho 83638
Petitioner
(208)634-2654

IN THE SUPREME COURT

OF THE UNITED STATES

APPENDIX

October Term, 1983

No. _____

JOSEPH P. KELLY,

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STATE OF IDAHO,

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PETITION FOR A WRIT OF CERTIORARI

TO THE IDAHO SUPREME COURT

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APPENDIX #1

IN THE DISTRICT COURT
OF THE THIRD JUDICIAL DISTRICT
OF THE STATE OF IDAHO,
IN THE FOR THE COUNTY OF ADAMS

STATE OF IDAHO,	)	
Plaintiff,	)	CRIMINAL NO.
-vs-	)	C-2112
JOSEPH KELLY,	)	O R D E R
Defendant.	)	

On May 1, 1979, the Court conducted an evidentiary hearing on the defendant's motion to suppress evidence seized pursuant to a search warrant. After considering the testimony produced at that hearing, as well as the transcript of the preliminary hearing, the briefs and arguments of counsel including the post-hearing briefs which have been filed, the authorities cited by counsel and

other authorities relevant to the issues, the Court has decided that the motion to suppress should be denied as to all items which the state intends to offer in evidence (as shown by the asterisks placed by the prosecuting attorney on the Return on the Search Warrant, attached hereto and made a part hereof as fully as if set forth herein). Since the trial of this case will be held on Tuesday, May 22, 1979, it is imperative that counsel be advised of this decision as soon as possible, therefore no written memorandum decision will be issued at this time. The Court may issue such memorandum decision at a later time.

IT IS HEREBY ORDERED that the defendant's motion to suppress be denied as to all items listed on the attached Return to Search Warrant which are marked with asterisks.

Dated this 16th day of May, 1979.

_____

District Judge

OFFICE OF
ADAMS COUNTY SHERIFF
Phone 253-4227
COUNCIL, IDAHO 83612

JIM HILEMAN, Sheriff
John Fisk, Undersheriff
Bill Clausen, Deputy
Paul Clagg, Deputy

IN THE DISTRICT COURT
OF THE THIRD JUDICIAL DISTRICT
OF THE STATE OF IDAHO
IN AND FOR
THE COUNTY OF ADAMS

STATE OF IDAHO)
County of Adams) SS.

SHERIFF'S RETURN ON SEARCH WARRANT

I, Jim Hileman, Sheriff of Adams County in the State of Idaho do hereby Certify and RETURN that I received the annexed SEARCH WARRANT on the 14th day of September, 1978, and thereafter on the same day conducted a search of the described main dwelling and surrounding buildings therein the Search Warrant.

In the Main dwelling and premises I found and seized the following articles:

*One Pipe with water (table on East Wall in living room)
*One small plastic bag of Marijuana (table on East wall in living room)
*One cigar box with roach clips and roaches (table on East wall in living room)

*One regular corn pipe (table on East wall in living room)
(One brown jar with green leaves contained therein (table on East wall in living room)
*One brown paper bag containing marijuana (table on East wall in living room)
*One drying rack hanging over heater in living room
*One pint fruit jar with marijuana in kitchen on top shelf--west wall
*One plastic bag with marijuana found in kitchen on top shelf--west wall
*One white paper bag with ground up marijuana in kitchen on cupboard--West side
*One quart fruit with green substance found on kitchen cupboard
*One mustard jar with green substance contained therein--kitchen cupboard
*One brown jar with green substance contained therein--kitchen cupboard
*One brown jar with green substance contained therein--kitchen cupboard
*One drying rack hanging over heating stove in kitchen
*One plastic bag with roach clips, shelf along side of stove in living room
*One plastic bag with marijuana found in shelf along side of stove in living room
*One small can ½ full of marijuana seeds in second drawer in kitchen
*One brown paper bag with marijuana in second drawer in cupboard in kitchen
*One plastic bag of marijuana wrapped in newspaper in freezer in kitchen
One list of names found on table in living room East wall
One black vinyl clip board, latter came out of, on table in living room East wall
One plant food, Gro Power found on table in living room

One plant food, hyponex found on table in living room
One twist roap (candle)? matter found on table in living room.

Search was commenced at approximately 2239 hours and concluded at approximately 01:00 A.M. with JIM HILEMAN, SHERIFF, LEROY BEAN SGT., WES ARMITAGE COP, FRANK GERTEN PATROLMAN, KEN ADLER PA, ANSON LONGTIN SPECIAL DEPUTY, AND DOROTHY HILEMAN SPECIAL DEPUTY were present and participated in the search.

OFFICE OF
ADAMS COUNTY SHERIFF
Phone 253-4227
COUNCIL, IDAHO 83612

JIM HILEMAN, Sheriff
John Fisk, Undersheriff
Bill Clausen, Deputy
Paul Clagg, Deputy

I further RETURN that on the 15 day of September, 1978, I continued the search of the main dwelling and surround buildings and grounds, and was commenced at approximately 0900 hours and further RETURN THAT I found the following and seized:

*Four marijuana plants next to Storage Shed (East side)
*Seven small plants (marijuana) 15 feet West of outside bathroom wall
*Two big marijuana plants (one seed plant and one regular plant)
*One plant between apple tree and fuel shed (garden spot)
*Two plants (Large marijuana) five feet and next to power pole in garden spot
*Seven plants (marijuana) East fence of garden next to apple tree (garden spot)
*Twenty-five marijuana plants in corn patch next to East fence (garden spot)
*Twenty-six marijuana plants between tomatoes and corn (garden spot)
*Ten marijuana plants between strawberries and apple tree (garden spot)
*Four plants (dried) found in storage shed hanging upside down (marijuana)
Eight millemeter film entitled "WOMEN" producer JOE on table east wall living room

One brown leather book "DIARY" found on table on East wall in living room

*One picture of marijuana in window found in box of pictures in living room

One box of super eight processed films and one super eight projector and one film screen and one super eight camera "BAUER C2A" contained in styrafoam cooler found in living room on East wall

*One magazine with article entitled "THE COMPLETE GUIDE TO GROWING MARIJUANA"

One McCall-New Meadows phone book

Three (8x11) papers with address and phone numbers and one colored picture with one *male subject and marijuana plant in background

One "AMERICAN" savings book balance 8-21-78 $1,330.82 and one "FEDERAL" savings book balance 8-24-78 $2,315.34

I further RETURN that the search concluded at approximately 12:00 P.M. and further RETURN that JIM HILEMAN SHERIFF, LEROY BEAN SGT., JOHN FISK UNDERSHERIFF, JAN CHEVERTON SGT., WESLEY ARMITAGE COP, BILL CLAUSEN LT., AND ANSON LONGTIN SPECIAL DEPUTY WERE present and participated in the search. I further RETURN that I was unable to locate any other items listed or pertaining to the search warrant and herewith RETURN said SEARCH WARRANT along with the fruits of the search.

_____

Sheriff, Adams County, Idaho

Done and dated this 20 day of September, 1978, at Council, Idaho A/D

APPENDIX #2

IN THE COURT OF APPEALS

OF THE STATE OF IDAHO

No. 13796

STATE OF IDAHO, Plaintiff-Respondent	)	1984 Opinion No. CA-6
v.	)	Filed: January 31, 1984
JOSEPH P. KELLY, Defendant-Appellant.	)	Frederick C. Lyon, Clerk

Appeal from the District Court of the Third Judicial District of the State of Idaho, Washington County. Honorable Jim R. Doolittle, District Judge.

Judgment of conviction for the felony of possession of marijuana with intent to manufacture, affirmed.

Joseph P. Kelly, appellant, pro se.

Jim Jones, Attorney General; Lynn E. Thomas, Solicitor General; Timothy M. Walton and Steven W. Berenter, Deputy Attorneys General; for respondent.

SWANSTROM, J.

Joseph Kelly appeals from his felony conviction for possession of marijuana with intent to manufacture. I.C.§37-2732(a)(1)(B). The issues we address in this opinion fall into two broad categories: (1) whether the contraband introduced by the state against Kelly at his trial should have been suppressed upon the ground that it was seized in violation of the fourth amendment; and (2) whether Idaho's laws forbidding and penalizing the growing of marijuana are unconstitutional. We affirm the judgment of conviction.

In 1978 Joseph Kelly purchased certain rural property in Adams County known as the See-Saw Ranch, consisting of a house, some outbuildings and acreage adjacent to U.S. Highway 95. In the late afternoon of September 14, 1978, Adams County Sheriff Jim Hileman and

his deputy, Leroy Bean, drove to the ranch to investigate an informant's tip that marijuana was growing there. The officers parked their vehicle along Highway 95 and walked down an embankment to Kelly's fence line. There they observed a patch of approximately 450 well-tended young plants on the other side of the fence. They concluded it was marijuana. Both men immediately crossed over the fence and uprooted the plants. They noted that Kelly's dwelling was about 300 yards from the marijuana patch and that there appeared to be a path leading from the patch to the house. Armed with this information, Bean drove to a magistrate's home in Weiser to obtain arrest and search warrants.[1]

---

1. The record indicates that the Adams County magistrate was unavailable. The nearest accessible magistrate was apparently at Weiser, in Washington County, some sixty miles away.

Bean testified under oath before the magistrate who found probable cause for issuing warrants to arrest Kelly and to search the buildings and premises for the See-Saw Ranch. Later that evening several officers returned to the ranch. They arrested Kelly and conducted a thorough search of the house and outbuildings, discovering dried marijuana, paraphernalia for smoking and processing marijuana and more growing plants. Unable to complete the search that evening, several officers returned the following day to finish the task. As a result of evidence obtained from this search and from the initial seizure, Kelly was convicted following a jury trial.

I

Kelly first urges that the contraband introduced against him should have been suppressed because the initial sei-

zure of the growing plants, which furnished the basis for obtaining the search warrant, was illegal. He emphasizes that in obtaining the evidence the officers trespassed upon his property. The question is whether the fourth amendment of the United States Constitution applies to the initial warrantless search and seizure, for if it does not, the evidence need not be suppressed; but if it does apply, at least the evidence seized initially must be suppressed.

Unless a person has a legitimate or reasonable expectation of privacy in the area searched, he is not entitled to the protections of the fourth amendment. Katz v. United States, 389 U.S. 347 (1967); State v. Martinez, 102 Idaho 875, 643 P.2d 555 (Ct. App. 1982). The reason is that "the Fourth Amendment protects people, not places. What a person knowingly exposes to the public,

even in his home or office, is not a subject of Fourth Amendment protection." Katz v. United States, 389 U.S. at 351. From this rule Justice Harlan derived his well-known twofold test. Before the fourth amendment applies to a search and seizure, a person must, first, "have exhibited an actual (subjective) expectation of privacy and, second, that . . . expectation [must] be one that society is prepared to recognize as 'reasonable.'" Id. at 361 (Harlan, J., concurring).

In Hester v. United States, 265 U.S. 57 (1924), the Supreme Court held that the fourth amendment protections do not extend to "open fields." Those protections are not brought into play unless there is an official search and seizure of a person, his papers or his effects, or an "actual physical invasion of his house 'or curtilage' for the pur-

pose of making a seizure." Olmstead v. United States, 277 U.S. 438, 466 (1928). A continuing debate has arisen in the courts concerning the effect of Katz on the "open fields doctrine" promulgated by Hester. See Case Comment, Katz in Open Fields, United States v. Oliver, 20 AM.CRIM.L.REV. 485 (1983). We, however, need not enter this debate today as, even under the narrower Katz formulation, the fourth amendment does not apply to the warrantless search and seizure in this case.

Applying Katz, we first hold that whether Kelly had a subjective expectation of privacy regarding the observation of marijuana growing near the boundary of his property, his expectation was in no sense reasonable. The patch was growing behind a barbed wire fence fifty feet from a public highway and the plants were visible, if not readily identifi-

able, to a person standing on the roadway. While it is not clear, the record suggests that the land between the highway and the fence is public property. Kelly does not contend, and the record does not show, that the officers committed any trespass until they crossed the fence adjacent to the highway right-of-way. They had already identified the plants as marijuana before they crossed the fence to seize the plants. It is clear that Kelly could have no reasonable expectation that members of the public would not walk along the highway right-of-way and look onto his property. This is no more than the officers did when they identified the plants as marijuana. The observation of the marijuana was thus not a search prohibited by the fourth amendment.

This case is akin to State v. Pontier, 95 Idaho 707, 518 P.2d 969

(1974). In that case, after receiving a tip that marijuana was growing in the defendant's backyard, the police received permission from a neighbor to enter her yard and look into Pontier's backyard for suspicious plants. Looking over a short picket fence and through overhanging foliage, the police identified marijuana plants growing near the defendant's garage. Relying upon Katz, supra, our Supreme Court held that the police observation of the defendant's yard was not a search within the purview of the fourth amendment. The court held that since Pontier was growing plants in a place where they were readily observable by a curious neighbor, the defendant had no reasonable expectation of privacy concerning the plants. 95 Idaho at 711, 518 P.2d at 973. See also United States v. Rucinski, 658 F.2d 741 (10th Cir. 1981), cert. denied, 455 U.S. 939 (1982).

It is, however, one thing to say that Kelly had no reasonable expectation of privacy which would permit him to challenge the warrantless observation of the marijuana from outside his property, but it is quite another thing to say that he had no reasonable expectation of privacy to prevent a warrantless trespass onto his property to seize the marijuana. The search and the seizure require independent analysis under Katz to determine whether either violates the fourth amendment. Having held that the observation of the marijuana was not a prohibited search, we now address the question of whether the officers violated the standards of the fourth amendment by crossing the barbed wire fence and seizing the growing marijuana.

In Katz, as noted above, the United States Supreme Court recognized that the fourth amendment protects people,

not places, against unreasonable searches and seizures. The Supreme Court further stated that "it becomes clear that the reach of the Amendment cannot turn upon the presence of absence of a physical intrusion to any given enclosure." Katz v. United States, 389 U.S. at 353. On the other hand, "the Court has not altogether abandoned the use of property concepts in determining the presence or absence of the privacy interests protected by that Amendment." Rakas v. Illinois, 439 U.S. 128, 143 n. 12 (1978). Therefore, the fact that the officers had to trespass on Kelly's property to seize the marijuana has some bearing on whether he is entitled to fourth amendment protection against that seizure.

Although the vitality of Hester v. United States, supra, is uncertain, it at least stands for the proposition

"that open fields are not areas in which one traditionally might reasonably expect privacy." United States v. Freie, 545 F.2d 1217, 1223 (9th Cir. 1976). A person, however, may strengthen his expectation of privacy in an open field should he attempt to exclude the public by means of, for example, a fence. See United States v. Van Dyke, 643 F.2d 992 (4th Cir. 1981). In the present case, the fence which divided Kelly's land from the outside world was a barbed wire fence. There is nothing about a barbed wire fence in itself which would be inconsistent with a reasonable expectation of privacy. While ineffective to keep out prying eyes, it may well be effective to prevent a physical trespass.

However, the fence with which Kelly seeks to establish a reasonable expectation of privacy seems of little value for either purpose. One observer stated

at the suppression hearing that the wire was loose, some of the fence posts were leaning and some wire was lying on the ground. Under these circumstances we cannot say that Kelly had a reasonable expectation of privacy in this open field. Cf. People v. Fillhart, 403 N.Y.S.2d 642 (1978) (the court upheld a seizure which occurred on property enclosed by "a stone fence in poor condition, about two to three feet high"). Not only do these facts fail to convince us that Kelly had a reasonable expectation of privacy, but they also cast doubts on whether he, in fact, had an actual or subjective expectation of privacy. Katz v. United States, 389 U.S. 347 (1967) (Harlan, J., concurring). We believe that the average farmer or rancher would not be shocked to learn he must have a fence and maintain it in good condition to have a reasonable

expectation of privacy to prevent trespasses upon what otherwise would be only an open field.

In Idaho this belief has a historical basis that has long been reflected in our statutes. For example, our laws have generally required a property owner in rural areas of the state to maintain a "lawful fence" before he can justifiably complain about trespassing domestic livestock. See I.C. §§ 35-101 to -112 and 25-2201 to -2211. Moreover, mere intrusions by persons onto fenced private land in rural areas of the state will not constitute a criminal trespass. Before such intrusions can be found to be unlawful, the property owner must have taken the extra step of posting his enclosed lands in the prescribed manner with "no trespassing" signs. I.C. §§ 6-202, 18-7008 and 36-1603. Here, there is no evidence that Kelly had his

property enclosed with a substantial fence or that he had posted any "no trespassing" signs. He has thus failed to show that he had taken any steps to exclude the public from that part of the property adjacent to the highway where the officers first seized the plants.

We hold, therefore, that the officers did not violate Kelly's fourth amendment rights by crossing the barbed wire fence. They were legally entitled to seize the marijuana which was in open view. This seizure, in turn, could be used as the basis for obtaining a valid search warrant directed to the buildings and the premises near the buildings.[2]

---

2. We note that the validity of the search warrant is not dependent upon the validity of the initial seizure. Independent of the seizure, the officers--by their observations of growing marijuana--had developed probable cause to obtain a search warrant before they went onto Kelly's property.

Kelly next urges that all the seized evidence should be suppressed because, in applying for a search warrant, Deputy Bean allegedly lied in sworn testimony to the magistrate. Specifically, Kelly claims that Bean lied when he told the magistrate that the marijuana uprooted by the officers was located on land being purchased by Kelly and that the path from the patch led to Kelly's house.

We note, initially, that when a search has been made pursuant to a warrant the burden is on the defendant to show that the search was invalid. W. RINGEL, SEARCHES & SEIZURES, ARREST AND CONFESSIONS § 7.1 (1983); State v. Lopez, 563 P.2d 295 (Ariz. App. 1977); State v. Koerstein, 493 P.2d 176 (Or. Ct. App. 1971), review denied (1972). In Franks v. Delaware, 438 U.S. 154, 155-56 (1978), the Supreme Court held:

> [W]here the defendant makes

> a substantial preliminary showing that a false statement knowingly and intentionally, or with reckless disregard for the truth, was included by the affiant in the affidavit, and if the allegedly false statement is necessary to the finding of probable cause, the Fourth Amendment requires that a hearing be held at the defendant's request. In the event that at the hearing the allegation of perjury or reckless disregard is established by a preponderance of the evidence, and, with the affidavit's false material set to one side, the affidavit's remaining content is insufficient to establish probable cause, the search warrant must be voided and the fruits of the search excluded to the same extent as if probable cause was lacking on the face of the affidavit.

Our Supreme Court applied this rule in State v. Lindner, 100 Idaho 37, 592 P.2d 852 (1979). In Lindner an officer seeking a warrant had mistakenly named a source for certain information the officer had provided to the magistrate. In fact, part of that information was obtained by the officer's own routine

investigation and not from the named source. The Supreme Court concluded that "at most only a negligent misrepresentation was made." In that context the court held that "negligent or innocent misrepresentations, even if necessary to establish probable cause, will not invalidate a warrant." Id. at 41, 593 P.2d at 856.

We have reviewed the record in this case, including the transcripts of the probable cause hearing before the magistrate, the preliminary hearing, the suppression hearing and testimony at the trial. We do not find disregard for the truth when he told the magistrate that the land where the marijuana was growing belonged to Kelly and that the path from the marijuana patch led to Kelly's house. Moreover, Kelly did not even attempt to establish that Bean's statements were false. Kelly did not

present any evidence, let alone establish by a preponderance of the evidence, that the patch was not located on his land, or that the path led elsewhere than to his home. Since Kelly did not meet this evidentiary burden, his attack on the warrant affidavit fails.

Kelly's next contention is that the evidence should have been suppressed because the magistrate lacked probable cause to issue the search warrant. This argument is devoid of merit. Kelly places too much reliance upon the officer's need to show the magistrate that he knew Kelly was purchasing the See-Saw Ranch and that the house on the property belonged to Kelly. Such information was not essential to the issuance of the warrant to search the property. Probable casue to search was shown regardless of who owned the premises and regardless of who occupied the house.

Bean testified that he and Sheriff Hileman discovered several hundred growing marijuana plants on land he thought was being purchased by Kelly. He testified that the patch had been recently cultivated, irrigated and fertilized. Bean also stated that there was a path leading from the patch to a house about 300 yards away. The patch was located within a fence encompassing the property known as the See-Saw Ranch. From this evidence a reasonable person could easily conclude that the patch was being cultivated by the owner or occupants of the ranch. A reasonable person could also conclude that there was likely to be more marijuana, as well as equipment and paraphernalia for processing or smoking it, located within the dwelling or in one or more of the outbuildings on the premises.

Kelly next argues that the warrant was invalid because the affidavit did

not contain enough facts to justify a nighttime search. Idaho Code § 19-4411 provides that a magistrate

> must insert a direction in the warrant that it be served in the daytime unless the affidavits are positive that the property is on the person or in the place to be searched, in which case he may insert a direction that it be served at any time of the day or night.

In addition, Idaho Criminal Rule 41(c) provides in part that a warrant must be served in the daytime "unless the issuing authority, by appropriate provision in the warrant, and for reasonable cause shown, authorizes its execution at times other than the daytime." To justify nighttime execution of the warrant, therefore, the affidavit must both show reasonable cause for conducting the search at night and must be positive that controlled substances are in the place to be searched. State v. Fowler,

___ Idaho ___, ___ P.2d ___ (Ct. App. December 6, 1983).

In this case the magistrate found that the evidence presented by Bean was sufficient to justify a nighttime search. A magistrate's finding of reasonable cause for a nighttime search will not be disturbed on appeal, absent an abuse of discretion. State v. Lindner, 100 Idaho at 43, 592 P.2d at 858.

We have carefully reviewed the record of the suppression hearings and the trial conducted by the district judge. We cannot find where any assertion was made in the district court that the search pursuant to the warrant was invalid because it was conducted at nighttime. Rather, the written and oral suppression motions focused upon other issues, such as the validity of the initial seizure of marijuana, the existence of probable cause to support the warrant,

the language employed in the warrant, and the scope of items taken under the warrant. The nighttime search issue is raised for the first time on appeal. The general rule in Idaho is that, in the absence of a timely objection to an alleged error at trial, an appellate court will not consider the alleged error on appeal. State v. Sharp, 101 Idaho 498, 616 P.2d 1034 (1980).

Failure to obtain a ruling on an issue below may not be fatal in a criminal case if the issue relates to "fundamental error." E.g., State v. Haggard, 94 Idaho 249, 486 P.2d 260 (1971). However, the doctrine of fundamental error is grounded in a criminal defendant's due process right to a fair trial. It generally applies to error committed during trial but to which no timely objection is then made. E.g., State v. Wells, 103 Idaho 137, 645 P.2d 371

(Ct. App. 1982). In contrast, suppression of evidence is a matter required by Rule 12, I.C.R., to be raised before trial. If an issue relating to suppression of evidence is not timely raised before trial, it is waived. A district court, as a matter of discretion, may--but is not required to--consider the issue later. E.g., State v. Gerhardt, 97 Idaho 603, 549 P.2d 262 (1976); State v. Collinsworth, 96 Idaho 910, 539 P.2d 263 (1975). However, where--as here--the asserted error relates not to infringement upon a constitutional right, but to violation of a rule or statute, we hold that the "fundamental error" doctrine is not invoked. Accordingly, we will not review the alleged error of issuing a "nighttime" search warrant in this case.

Kelly asserts next that the warrant was constitutionally defective because

it was general on its face. Specifically, Kelly objects because the warrant authorized the officers to search his premises not only for an "illegal substance (to-wit: marijuana) together with instrumentalities for the processing and/or use of such substance" but also "for any other fruits, instrumentalities and evidence of crime."

The Supreme Court addressed a similar issue in the case of Andresen v. Maryland, 427 U.S. 563 (1976). In that case an attorney was charged with the crime of false pretenses in connection with a land sale. The police obtained warrants to search his office for documents pertaining to the transaction. In appealing his conviction, the attorney claimed that the warrants were impermissibly general because in each warrant, at the end of a list of particular items to be seized, there appeared a phrase

authorizing the police to seize "other fruits, instrumentalities and evidence of crime at this [time] unknown." In rejecting the argument that this language rendered the warrants fatally general, the Supreme Court determined that, from the context, it was clear that the term "crime" in the warrants referred only to the crime of false pretenses with respect to the land transaction in question. The Supreme Court held that the warrants were not general because they did not authorize the officers to search for evidence of other crimes, but only for evidence relevant to the charge of false pretenses. 427 U.S. at 480-81.

We have previously applied Andresen in State v. Wolf, 102 Idaho 789, 640 P.2d 1190 (Ct. App. 1982), and we believe Andresen is also controlling here. Where, as here, a residual phrase in a warrant, such as "other fruits, instru-

mentalities and evidence of crime," follows a specific enumeration of the items to be seized, it should be read as only authorizing a search for evidence relating to the crime alleged, and not as authorizing a general search for evidence of other unrelated crimes. Viewed in this light, the warrant is valid.

Kelly also contends that the evidence seized in the search of his house must be suppressed because, even if the warrant was not general on its face, it was "executed generally" by the officers. He argues that the officers conducted three separate searches lasting many hours, and that the officers seized many items that clearly were not contraband. Several dozen items were listed on the sheriff's return of the warrant. The great majority of items were either contraband or items used for processing or smoking marijuana. Following a sup-

pression hearing, the district court suppressed several items of questionable relevancy to the crime charged against Kelly. However, Kelly contends that the court did not go far enough. He argues that the officers engaged in a wholesale search and that, for this reason, all the evidence they seized must be suppressed. We disagree.

The record shows that the officers began their search late in the evening. They found many marijuana plants growing near Kelly's house and large quantities of the plant in various stages of the processing. Unable to complete their search due to darkness, one of the officers was left to stand guard and the others returned the next morning. The so-called "third search" occurred on the second day when the officers returned after lunch to pick up the evidence they had gathered. We believe that the dura-

tion of the search did not render it invalid. Moreover, because most of the items seized were in fact related to the marijuana operation, and because none of the other items were used as a basis for charging any other crime, we conclude that the officers did not conduct an indiscriminate search so offensive to fourth amendment values that all evidence need be suppressed.

Finally, Kelly contends that the evidence seized from him must be suppressed for failure of the sheriff to deliver to him a copy of the return of the warrant or to leave a copy of the return at his house. In State v. Curry, 103 Idaho 332, 647 P.2d 788 (Ct. App. 1982), we addressed a similar problem. We held that defects in the return of a search warrant are not of a constitutional dimension. They do not require the warrant to be quashed and evidence

seized pursuant to an otherwise valid search to be suppressed unless a defendant demonstrates that he has been substantially prejudiced by lack of the return. Here Kelly has demonstrated no prejudice from the failure of the sheriff to properly deliver a copy of the return to him. Accordingly, the evidence need not be suppressed.

II

Kelly next raises several constitutional challenges to Idaho's marijuana laws which are not part of this petition and not submitted.

APPENDIX #3

IDAHO SUPREME COURT

COURT OF APPEALS

STATE OF IDAHO,	)	
	)	
Plaintiff-Respondent,	)	O R D E R
	)	NO. 13796
v.	)	
	)	Ref. No. 84R-6
JOSEPH P. KELLY,	)	
	)	
Defendant-Appellant.	)	

COUNSEL:

The Supreme Court has ORDERED that Appellant's PETITION FOR REVIEW filed February 21, 1984 of the Opinion of the Court of Appeals filed January 31, 1984 be, and hereby is, DENIED.

Dated this 11th day of June, 1984.

By Order of the Supreme Court

_____

Frederick C. Lyon, Clerk
Supreme Court/Court of Appeals
State of Idaho

APPENDIX #4

OFFICE OF
ADAMS COUNTY SHERIFF
Phone 253-4227
COUNCIL, IDAHO 83612

JIM HILEMAN, Sheriff
John Fisk, Undersheriff
Bill Clausen, Deputy
Paul Clagg, Deputy

THIS IS TO CERTIFY AND STATE RETURN OF THE BELOW STATED ITEMS TO SUBJECT JOSEPH KELLY CASE NO. 3899P

One Super eight Camera BAUER C2A
One movie screen
One SUPERSCORE tape recorder
One EUMIG super eight projector
98 SUPER EIGHT movie processed reels of film
5 SUPER EIGHT movie processed reels of film

RETURNED THIS 4th DAY OF OCTOBER, 1978

OFFICE OF
ADAMS COUNTY SHERIFF
Phone 253-4227
COUNCIL, IDAHO 83612

JIM HILEMAN, Sheriff
John Fisk, Undersheriff
Bill Clausen, Deputy
Paul Clagg, Deputy

DECEMBER 20, 1978

I HEREBY CERTIFY AND SIGN BELOW FOR ITEMS LISTED BELOW REFERENCE TO CASE STATE OF IDAHO -vs- JOSEPH KELLY

1. FOUR PAPERS WITH MISCELLANEOUS ADDRESSES WRITTEN THEREON
2. TWO SAVING ACCOUNT BOOKS "FIRST FEDERAL SAVINGS" AMERICAN SAVINGS BEVERLY HILLS
3. ONE ROPE LIGHTER
4. ONE 16 MILL. FILM (REEL) MARKED "WOMEN"
5. ONE NEW MEADOWS, MCCALL PHONE BOOK 1976-77
6. ONE ROPE INCENT
7. ONE LETTER ON COPY PAPER
8. ONE LEATHER BROWN BOOK "DIARY"
9. ONE "THE COMPLETE GUIDE TO GROWING MARIJUANA" BOOK
10. ONE YELLOW SHEET PAPER WITH NAMES AND ADDRESS WRITTEN THEREON
11. ONE COLORED PICTURE OF MALE SUBJECT WITH MARIJUANA PLANT IN BACKGROUND
12. ONE WOODEN CROCKER CONTAINING GREEN LEAFY SUBSTANCE
13. ONE CROCK CONTAINER CONTAINING GREEN LEAFY SUBSTANCE
14. ONE YOGURT CONTAINER CONTAINING PLANT FOOD
15. ONE SMALL JAR CONTAINING GREEN LEAFY SUBSTANCE

16. ONE MEDIUM JAR CONTAINING GREEN LEAFY SUBSTANCE
17. ONE LARGE JAR CONTAINING GREEN LEAFY SUBSTANCE

_____
JOSEPH KELLY

RETURNED THIS 21st DAY OF DECEMBER, 1978, AT COUNCIL, IDAHO A/D

APPENDIX #5

Trial Transcript Excerpts

Page 50

Q And was there a lot of foliage and greenery in this area?

A Yes, there was.

Q Was it well developed, tall? Some of it tall and well developed?

A The foliage?

Q Yes.

A Yes.

Q Was it thick foliage?

A Brush.

Page 78

Q Were you able then from standing up on the highway to make a positive identification of any plants?

A Of plants, yes. But I didn't know what they were at that time.

Q You knew that they were plants, but you didn't know what kinds of plants from up on the

highway?

A Yes.

Q You only learned what kinds of plants they were after you went down, and came how close to the plants did you actually approach before you were able to make a positive identification?

A We was right up to them. They was against the fence.

Page 63

Q Before leaving the actual pavement of the highway, and going down the bank, did you make any effort to establish what the highway right-of-way was through that area?

A No, I did not.

Q After you participated in digging up these plants, what happened next?

A We brought them back to the sheriff's office.

Q Did you prior to--between digging up the plants and leaving for the sheriff's office wander from this area at all where the plants were, or was this like an immediate thing?

A (No response.)

Q I mean, how long after the last plant was dug up did you bring them back?

A I would guess as soon as we pulled the plants we come back to town.

Q After going to town, what did you do next?

A Brought them to the sheriff's office, and contacted the prosecuting attorney.

Page 67-68

Q Between the time when you first went out there, and dug up these plants, and the time that you left for Weiser, please, describe what efforts you made to establish the ownership of the land from which you dug the plants?

A (No response.)

Q Did you make any efforts?

A No, sir.

Q Had you ever come to this area and gone on the See-Saw Ranch driveway prior to September 14th, 1978?

A Not that I recall.

Q Did you know anything about the marital status of the--of Mr. Kelly on the 14th of

September?

A Excuse me?

Q Did you know whether he was married or single?

A No, I did not.

Q Did you know whether he had a family living with him in his house?

A No.

Q Did you know if there were any persons unrelated to him who were living in this house?

A Not that I knew of.

Q Please--did you make any efforts to ascertain any of these facts that I just asked about, his marital status, whether he had a family living with him?

A No, I did not.

Page 94

Q On direct did you testify that you did, or did not talk with Mr. Longtin when he was out there taking pictures about the property boundaries?

A I don't remember talking to him about the property boundaries, no.

Q Did you talk about the property boundaries with him at any time on the 14th of September?

A No, I didn't.

Page 83

Q Okay, and you followed it for ten or fifteen feet; is that your testimony--

A Just out to the first little hump there by a ditch, or drainage.

Q And then you testified that it intersects with a road, and was it your testimony that it goes past that road?

A Yes.

Q And you saw it going past that road?

A Yes, you could see it from that area.

Q As best you could tell, where did it [the path] end?

A Well, I couldn't see where it ended at all.

Page 130

A Oh, it's not too large. I would say probably in the neighborhood of a thousand square feet, twelve hundred square feet. Something like that I guess, I don't know.

Page 389

A When I followed you in to make your phone call I seen no one else in the residence.

Q Did you go through the entire house?

A No.

Page 98

A I didn't see the search warrant myself.

Q Did anybody tell you anything about the search warrant?

A Yes, that it had been served.

Q Did anybody read it to you or--

A Not to me.

Q--tell you--

A No.

Q--what it authorized people to search for?

A No.

Page 16

Q Were you deputized on September 14th, 1978?

A Yes.

Q By whom?

A It would have been my husband.

Q And about what time of day or night was it

that you were deputized?

A Approximately seven.

Q Where were you when you were deputized?

A Along the vehicle.

Page 153

Q Were you deputized?

A Yes.

Q Immediately upon arrival?

A Yes.

Q By whom?

A The sheriff.

Page 118

Q Where did you see me?

A At the top of the driveway where the driveway serving the Kelly house meets Highway Ninety-five.

Q Did you and I have a discussion there?

A Certainly did.

Q Do you remember the substance of that?

A Certainly.

Q Would you please tell us about it?

A You inquired whether you could be present to see the--in a passive way see the ongoing search.

I said you could not.

Q Whose decision--were you communicating your own decision--

A Yes.

Page 138

A I have the records, yes.

Q Did you ever deliver a copy of it to the defendant?

A I didn't personally, no.

Q Do you know from the best of your knowledge if any member of your department or any person acting on behalf of your department ever gave the defendant a copy of that inventory?

A I'm not sure.

Q Was a search warrant--did you testify that you didn't know whether the search warrant had ever been served on the defendant?

A I don't know as it ever was served on him personally.

Q You--

A I believe you were served or showed it.

Q Would your records indicate or any records

ever--that you have custody of indicate whether the defendant was given a copy of the inventory, and whether the search warrant was ever showed on him--served on him?

A I don't know. I would have to look and see.

Page 141

A Yes, they was a tape recorder that--

Q Did you believe at the time of seizing this that it was connected or related to marijuana use, possession, or cultivation?

A They was several tapes, and they was a tape inside of it that I believe could have been, yes.

Q Did you return on your sheriff's return any of the tapes that you seized?

A Did we return them?

Q Yes, did you indicate--did you put--list them on your return of service that you filed with the Court?

A I haven't got my return of service. I would have to see it to--

APPENDIX #6

Excerpts, Affidavit Hearing

September 14, 1978

Pages 2-3

Q On this day did you have reason to visit the premises owned by Joe Kelly north of Council?

A I did.

Q Were you able to observe from public access on the highway any suspicious materials growing on the premises owned by Joe Kelly?

A Yes, I did.

Q What material did you believe that you were seeing?

A Marijuana plants.

Page 4

A No. It is approximately 300 yards.

Page 6

Q Is the area from which this marijuana was seized, area owned by Joe Kelly?

A No, it isn't.

Q Being purchased by Joe Kelly.

A Yes.

Q Does he live there?

A Yes.

Q To your knowledge no one else lives there.

A Negative.

. . .

Q Was there a path leading to this field?

A Yes, there was.

Q Where did the path--when you left the field along the path, where did it go?

A To the residence where this subject resides.

Q Where Joe Kelly lives?

A Yes.

Page 9

Q Mr. Bean, have you worked in--extensively in drug-related cases in the past?

A Yes, in California.

Q Marijuana-related cases?

A Yes.

. . .

Q Do you feel that it is necessary that this warrant, if it is issued, be issued to be exercis-

able day or night in order to secure the premises and to take custody of Mr. Kelly and to insure that no evidence is destroyed?

A Yes, I do.

Pages 16-17

MR. ADLER: --Your Honor, let me point one thing out. In this warrant I put in, in describing the property, were the items to be sought, marijuana, paraphernalia used in marijuana, and associated things, also contraband and evidence of crime. If this is overbroad, I invite the Court to excise such portions of it as the Court feels are overbroad. But since there is evidence of the crime at present, I did want to assure that the officers had latitude to look for all the related paraphernalia of marijuana use, processing, bookkeeping, distribution, sale and so on.

THE COURT: Very well. The Court finds that the testimony--from the testimony that it is sufficient to justify a search warrant of the premises as described, together with the grounds adjacent to said house and shed, and any paraphernalia

that might be related to, including books and records that the party might have. In other words, a complete search of the premises and the property adjacent to it.

APPENDIX #7

Preliminary Hearing Excerpts

Page 80-81

MR. SCHOENHUT: That he had found marijuana on the defendant's premises.

THE COURT: Overrule the objection.

Q Didn't you so state to Judge Joseph?

A In regards to the marijuana that was found?

Q Yes.

A Yes.

Q When as a matter of fact you didn't actually know whether or not that marijuana was on the defendant's premises, isn't that true?

A It's true.

Pages 46-47

A I worked in several different fields. I worked in Animal Control Division, and I worked--

Q--How long did you work in Animal Control Division?

A About two and a half years.

Q That was about what year?

A That was '73 and '74.

Q What other different divisions did you work in?

A I worked in the Lake Division.

Q The what?

A Lake Patrol Division.

Q And what were your duties in the Lake Patrol Division?

A Duties? Traffic control, and just general police work.

Q Why Lake Patrol? Did you go out on the lake on boats and this sort of thing?

A Uh-huh.

Q How long were you in that?

A A little over a year.

Q Animal Control, I assume, is dog catcher sort of duties, is that correct?

A Not necessarily in that area. We worked other--

Q Other animals?

A Other different--livestock, field work of all types.

Q Okay. And what other position did you hold?

What other duties did you have?

A We assisted in all.

Q I understand you first started out in Animal Control and then you went to Lake, and then where did you go from there?

A I moved up here.

Page 49

Q You said you went to a school on marijuana for two days, is that correct?

A It was a general school.

Page 72

Q Have you had to testify in courts of Shasta County on those kind of cases?

A No, I never did.

Q Never did have to testify.

A No.

APPENDIX #8

Idaho Perjury Laws

18-5401. Perjury defined.--Every person who, having taken an oath that he will testify, declare, depose, or certify truly, before any competent tribunal, officer, or person in any of the cases in which such an oath may by law be administered, wilfully and contrary to such oath, states as true any material matter which he knows to be false, is guilty of perjury. [I.C., § 18-5301, as added by 1972, ch. 336, § 1, p. 844.]

18-5408. Unqualified statement of unknown fact.--An unqualified statement of that which one does not know to be true is equivalent to a statement of that which one knows to be false. [I.C., § 18-5408, as added by 1972, ch. 335, § 1, p. 844.]

APPENDIX #9

The Search Warrant

IN THE DISTRICT COURT

OF THE THIRD JUDICIAL DISTRICT

OF THE STATE OF IDAHO,

IN AND FOR THE

COUNTY OF ADAMS,

MAGISTRATE DIVISION

STATE OF IDAHO, Plaintiff, -vs- JOE KELLY, Defendant	SEARCH WARRANT (day or night)

THE STATE OF IDAHO TO ANY SHERIFF, CONSTABLE, MARSHALL OR POLICEMAN IN THE COUNTY OF ADAMS:

Proof by affidavit having been this day made before me by Leroy Bean, Deputy Sheriff of Adams County, showing that

an illegal substance (to wit: marijuana) together with instrumentalities for the processing and/or use of such substance are located within and about the following premises:

> A white wood frame house with green trim, one story high, with front door facing South, located in Adams County approximately seven miles North of the City of Council, and immediately westerly of milepost marker 143 of U.S. Highway 95, and lying downhill from said Highway, together with a shed located southwesterly of said house and together with the grounds adjacent to said house and shed,

and this Court having specifically hereby determined that adequate grounds exist to authorize the search to be made at any hour of the day or night;

YOU ARE THEREFORE COMMANDED at any time of the day or night to make immediate search of the premises above described for the property above described, and for any other fruits,

instrumentalities or evidence of crime, and if you find the same to bring it forthwith before the Court at the City of Council, County of Adams, Idaho.

Return to this WARRANT is to be made to the above entitled.

APPENDIX #10

Decision of the

Ninth Circuit Court of Appeals

Kelly v. Adams County,

No. 82-3274

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

JOSEPH P. KELLY, Plaintiff-Appellant,	)	No. 82-3274
vs.	)	DC # CV-80-1225-FMT
ADAMS COUNTY, IDAHO, JAMES HILEMAN, KENNETH P. ADLER and ANSON J. LONGTIN, Defentants-Appellees.	)	MEMORANDUM

Appeal from the United States District Court
for the District of Idaho
Fred M. Taylor, District Judge, Presiding
Argued February 8, 1983
Submitted August 18, 1983

Before: WALLACE, ANDERSON, AND SCHROEDER, Circuit

Judges.

This is an action pursuant to 42 U.S.C. § 1983 for damages in connection with the seizure of certain items during the course of a search in which the individual defendants all participated.

The search was conducted pursuant to a warrant which the state trial court determined validly supported the seizure of the items used in evidence at the trial. The seized items at issue here were not used as evidence in plaintiff's state criminal trial, however, and there is nothing in this record to show that the state court ruled that the seizure of these items was lawful. Thus, the collateral estoppel principle enunciated in Allen v. McCurry, 449 U.S. 90 (1980), is inapplicable. See Haring v. Proisse, 51 U.S.L.W. 4733, 4738-41 (U.S. June 14, 1984)(collateral estoppel inapplicable to section 1983 action based on fourth amendment claim when no opportunity to raise claim exists).

Most of the items at issue, which include films, a projector, and a diary, have no obvious rela-

tionship to the crime which served as the basis for the issuance of the warrant, i.e. the possession of marijuana, or to any other crime; the defendants have presented no evidence which would suggest such a relationship to the warrant. We therefore assume, only for purposes of this appeal from the district court's grant of summary judgment for the defendants, that the items seized were seized improperly because they were beyond the scope of the warrant. See United States v. Wright, 667 F.2d 793, 797-99 (9th Cir. 1982. Our assumption, however, is predicated on the fact that we must now view the facts in a light most favorable to the plaintiff. In any further proceedings, defendants may present evidence that the items at issue were fruits, instrumentalities, or evidence of crime and thus, that their seizure was within the scope of the warrant. To the extent such evidence is presented, triable issues of fact may exist with respect to the seizure.

If, as we assume here, the items at issue were

seized unlawfully, there is a further issue with respect to liability. Both Adler and Hileman are entitled to a certain immunity from suit under section 1983. To the extent Adler may have acted in a non-prosecutorial role during the search, at least a qualified good faith immunity exists. Harlow v. Fitzgerald, __ U.S. __, n.16, 102 S. Ct. 2727, 2735 n.16 (1982); Butz v. Economou, 438 U.S. 478, 515-17 (1978); Imbler v. Pachtman, 424 U.S. 409, 430-31 (1976); see Marrero v. City of Hialeah, 625 F.2d 499, 506-11 (5th Cir. 1980), cert. denied, 450 U.S. 913 (1981); Jacobson v. Rose, 592 F.2d 515, 524 (9th Cir. 1978), cert. denied, 442 U.S. 930 (1979). Hileman is also entitled to a qualified immunity. Pierson v. Ray, 386 U.S. 547 (1967); Smiddy v. Varney, 665 F.2d 261, 266 (9th Cir. 1981), cert. denied, 103 S. Ct. 65 (1982); Beard v. Udall, 648 F.2d 1264, 1271 (9th Cir. 1981).

Defendants properly pleaded their entitlement to a qualified good faith immunity as a defense to Kelly's action. Gomez v. Toledo, 46 U.S. 635

(1980). They were entitled to summary judgment on that defense if there was no material issue of fact concerning whether the defendants knew or reasonably should have known that their actions during the search and seizure were outside the scope of the warrant. Harlow v. Fitzgerald, supra, __ U.S. at __, 102 S. Ct. at 2739 (defining scope of qualified immunity).

On the basis of the record before us, we cannot conclude that summary judgment for these defendants was proper. Since plaintiff alleged an intentional violation of his fourth amendment rights and seeks damages separate from the value of the property deprivation, he has stated a cognizable claim under section 1983. Cf. Parratt v. Taylor, 451 U.S. 527 (1981). In order to prevail on their immunity defense, the individual defendants must have shown that their conduct came within the scope of that immunity. Harris v. Roseburg, 664 F.2d 1121, 1129-30 (9th Cir. 1981). We cannot conclude as a matter of law, however, that these defendants did not, and should not have rea-

sonably known that their actions were outside the scope of the warrant.

With respect to defendant Longtin, his liability for participation in the search as a deputy is subject to the same principles which apply to Hileman and Adler and summary judgment for him on the search claim was therefore also improper. The claim with respect to his publication of information obtained from the search raises a different issue however. Even assuming that his actions with respect to publication can be regarded as action taken under color of state law, Kelly's claim is for injury to reputation. It is therefore akin to a defamation claim and is not within the purview of section 1983. Paul v. Davis, 424 U.S. 693 (1976).

> The dismissal of the complaint against Adams County must be affirmed, however, because it failed to state a claim for relief. The complaint against the county is predicated on the theory that the sheriff and prosecutor were acting as the county's agents. Under Monell v. Department of Social Services of the City of New York, 436 U.S. 658 (1978), a municipality cannot be held liable on a respondent superior theory for the

> actions of its agents. The county, if it is a municipality rather than an arm of the state enjoying immunity under the eleventh amendment, is liable only if a constitutional tort was committed pursuant to official municipal policy. No such claim has been stated.

The judgment in favor of Adams County is affirmed. The judgments in favor of the individual defendants are reversed and the matter is remanded for further proceedings.

Affirmed in part; reversed in part.

APPENDIX #11

Item #22

Seized Under the Search Warrant

Because this appendix is typed into the petition it is not retyped here. The word "weeks" in the petition should be "weeds."

U.S. and Idaho Rules of

Criminal Procedure §41(d)

U.S. Rule 41

(d) Execution and Return with Inventory. The officer taking property under the warrant shall give to the person from whom or from whose premises the property was taken a copy of the warrant and a receipt for the property taken or shall leave the copy and receipt at the place from which the property was taken. The return shall be made promptly and shall be accompanied by a written inventory of any property taken. The inventory shall be made in the presence of the applicant for the warrant and the person from whose possession or premises the property was taken, if they are present, or in the presence of at least one credible person other than the applicant for the warrant or the person from whose possession or premises the property was taken, and shall be verified by the officer. The federal magistrate shall upon request deliver a copy of the inventory to the person from whom or from whose premises the property

was taken and to the applicant for the warrant.

Idaho Rule 41

(d) Execution and return with inventory. The officer taking property under the warrant shall give to the person from whom or from whose premises the property was taken a copy of the warrant and a receipt for property taken or shall leave a copy and receipt at the place from which the property was taken. A verified return shall be promptly made to a district court judge or magistrate in the county where a warrant for the seizure of property or a person was issued. The inventory shall be made by one of the officers executing the warrant in the presence of the person from whose possession or premises the property was taken; provided, if such person is not present, the executing officer shall make the inventory in the presence of at least one (1) credible person of age. The district judge or magistrate shall, upon request, deliver a copy of the inventory to the person from whom or from whose premises the property was taken and to the applicant for the warrant. The district judge or magistrate before whom the warrant is returned shall attach to the

warrant a copy of the return, inventory and all other papers in connection therewith and shall file them with the clerk of the district court for the county in which the warrant was issued.

CERTIFICATE OF MAILING

On August 23, 1984, I mailed, by first class postage, forty (40) copies of the Amended Petition for a Writ of Certiorari with appendix to the Clerk of the U.S. Supreme Court, 1 First Street N.E., Washington, D.C., 20543; and three (3) copies of said Amended Petition and appendix to the Idaho Attorney General, Statehouse, Boise, Idaho, 93720.

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McCall, Idaho 83638
Petitioner
(208)634-2654